

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

WT Docket No. 96-18

PP Docket No. 93-253

In the Matter of

Revision of Part 22 and
Part 90 of the Commission's
Rules to Facilitate Future
Development of Paging
Systems

Implementation of
Section 309(j) of the
Communications Act--
Competitive Bidding

To: The Commission

REPLY COMMENTS ON FURTHER NOTICE OF PROPOSED RULE MAKING

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ProNet Inc. ("ProNet"), by its attorneys and pursuant to Section 1.421 of the Commission's Rules, 47 C.F.R. § 1.421, hereby submits its Reply Comments on the Commission's Further Notice of Proposed Rule Making ("FNPRM")^{1/} in the above captioned proceeding.

I. INTRODUCTION AND SUMMARY

In its Comments, ProNet urged the Commission to:

- refrain from imposing additional geographic coverage requirements on nationwide 931 MHz licensees, who have already complied with significant construction and coverage benchmarks;
- allow partitioning by nationwide licensees on the same terms and conditions as other geographic licensees;

^{1/}The *FNPRM* was released simultaneously with the Commission's *Second Report and Order* in this proceeding ("*2nd R&O*") on February 26, 1997, and was published in the Federal Register on March 12, 1997.

- apply objective coverage requirements and, where applicable, unjust enrichment provisions equally to partitioners and partitionees; and
- take additional steps to curtail application fraud with respect to the shared paging channels.

The above-stated positions are supported by the vast majority of commenting parties, and should be adopted by the Commission. In addition, ProNet notes that while curtailing abuse of the geographic licensing process is a paramount concern, the Commission should avoid undue restraints on partitioning which may diminish licensee flexibility and inhibit effective use of paging spectrum. At the same time, the Commission should give serious consideration to ProNet's suggestion, discussed herein, that threshold construction and service requirements be imposed on non-incumbent geographic licensees as a condition to partitioning.

II. ADDITIONAL COVERAGE REQUIREMENTS FOR NATIONWIDE PAGING LICENSEES ARE UNWARRANTED

In response to the FNPRM, an overwhelming number of commentators opposed the Commission's proposal to impose minimum coverage requirements on the three nationwide 931 MHz licensees and 23 nationwide exclusive 929 MHz licensees.^{2/} Like ProNet, these parties provide compelling reasons why nationwide coverage requirements are a bad idea:

^{2/}Only one commenter, Blooston, Mordkofsky, Jackson & Dickens ("Blooston"), filing on behalf of its local and regional paging clients, supports the imposition of coverage requirements on nationwide licensees. Blooston's contentions are addressed at pages 3-4, *infra*.

- Nationwide licensees have already met and exceeded rigorous construction and coverage requirements under current or pre-existing Commission rules;^{3/}
- Licensees reasonably relied upon existing Commission rules governing construction and coverage requirements in designing their networks;^{4/}
- Commission-imposed coverage requirements are arbitrary and inefficient compared to proven market-based incentives to build and deploy nationwide paging facilities;^{5/}
- No sufficient rationale exists for imposing a new qualifying standard retroactively on nationwide exclusivity;^{6/} and
- New construction/coverage requirements will modify nationwide licenses, triggering the procedural requirements of Section 316 of the Communications Act of 1934, as amended (the "Act").^{7/}

In stark contrast to the foregoing, the sole justification proffered by the Commission in proposing new nationwide coverage requirements is "regulatory parity." Specifically, the FNPRM proposes generally the same coverage requirements imposed on MTA and EA geographic area licensees. Similarly, the 2nd R&O (at ¶54) notes an inconsistency between nationwide coverage

^{3/}Indeed, as noted in the Comments of ProNet (at 3-4) and the Personal Communications Industry Association ("PCIA") (at 4-5), the Commission itself has already acknowledged the extensive construction and coverage by nationwide 931 and 929 MHz licensees. See 2nd R&O, at ¶50.

^{4/}Comments of PCIA, at 5; Comments of Paging Network, Inc. ("PageNet"), at 9-10.

^{5/}Nationwide paging licensees have already made enormous capital investments in acquiring and constructing their networks. Comments of ProNet, at 6; Comments of PageNet, at 3. See, also, Comments of PCIA at 5; Comments of Metrocall, Inc. ("Metrocall"), at 8-9; Comments of Airtouch Paging ("Airtouch"), at 2-3.

^{6/}The Commission's objectives of rapid service deployment, efficient use of spectrum and discouraging spectrum warehousing are already being met by the expansive construction of nationwide systems. Comments of ProNet, at 4-5; Comments of Metrocall, at 7-8; Comments of PageMart II, Inc. ("PageMart"), at 2-3. The Commission's objective of regulatory parity is discussed *infra*.

^{7/}Comments of ProNet, at 6-7; Comments of PageMart, at 4; Comments of Metrocall, at 5-7.

requirements for Part 22 paging, Part 90 paging and narrowband personal communications service ("PCS"). None of these purported inconsistencies, however, warrant the imposition of new coverage requirements for nationwide paging.

First, to the extent disparate treatment exists between nationwide licensees, on the one hand, and MTA/EA licensees, on the other hand, these licensees are not "similarly situated." While nationwide licensees arguably have a competitive advantage due to their exemption from auctions, this advantage has been earned, at considerable expense, through compliance with pre-existing construction and/or coverage requirements that far exceed what will ultimately be required of geographic licensees.^{8/} Moreover, rather than establishing parity with MTA/EA licensees, requiring two-thirds coverage of the entire U.S. population will disproportionately burden nationwide licensees by necessitating construction of multiple transmitters throughout sparsely populated portions of the country, requiring a substantial (but, probably, an inefficient) capital expenditure.^{9/}

Second, the differences between existing coverage requirements for 931 MHz (Part 22) and 929 MHz (Part 90) nationwide licensees are moot. ProNet's nationwide 931.9125 MHz system and, it suspects, the majority of nationwide 929/931 MHz systems, already comply with both sets of

^{8/}See Comments of PageNet, at 4-5. While ProNet agrees with PageNet's claim that the coverage requirements already imposed on nationwide paging licensees are similar in nature to the requirements to be imposed on MTA/EA licensees, in terms of number of transmitters and associated capital cost, nationwide licensees have faced a far greater burden.

^{9/}According to 1990 population data reviewed by ProNet, a nationwide licensee that provides blanket coverage to the nation's fifty largest metropolitan areas will still fall roughly 18 per cent short of the proposed population coverage requirement. By contrast, even in large MTAs, geographic licensees will can satisfy their requirements by constructing a relatively small number of transmitters covering only the major population concentrations in the MTA.

coverage requirements.^{10/} In fact, by declining to codify construction/coverage requirements in Part 22 over the past decade, the Commission has tacitly acknowledged that construction/coverage requirements are unnecessary.

Third, nationwide narrowband PCS licensees are presently subject to more stringent construction/coverage requirements than their nationwide paging counterparts because, in contrast to paging's maturity, narrowband PCS is a nascent service in need of regulatory incentives to promote competition, efficient spectrum use and universal service.^{11/} Remarkably, however, the Commission is now proposing to eradicate this disparity-- *not* by increasing construction and coverage requirements imposed on nationwide and geographic paging licensees, but by *eliminating* these requirements for narrowband PCS carriers. Specifically, the Further Notice of Proposed Rule Making in GEN Docket No. 90-314^{12/} now recommends, *inter alia*, relaxing or eliminating coverage requirements for narrowband PCS because the lesser requirements imposed on paging carriers (in the above-captioned proceeding) appear more reasonable.^{13/}

^{10/}See Comments of ProNet, at 3-4.

^{11/}*Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services*, Memorandum Opinion and Order, 9 FCC Rcd 1309, 1313-1314 (1994).

^{12/}*Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS*, GEN Docket No. 90-314 and ET Docket No. 92-100, Report and Order and Further Notice of Proposed Rulemaking, released April 23, 1997 ("PCS FNPRM").

^{13/}In the *PCS FNPRM* (at ¶45, n.138), the Commission cites with approval the rules governing initial construction of nationwide 931 and 929 MHz paging systems. Further, in the *PCS FNPRM*, the Commission acknowledges that coverage requirements for narrowband PCS may be unnecessary to promote service in rural or underserved areas because: (1) narrowband PCS has already been licensed on a nationwide basis; (2) competing services are widely available throughout the U.S.; and (3) partitioning should increase the potential for service to rural or underserved areas. *PCS NPRM*, at ¶47. Each of these justifications is equally if not more applicable to 931 and 929
(continued...)

Finally, construction and coverage requirements are wholly unnecessary in a narrowband wireless communications industry that, viewed in the aggregate, is intensely competitive and currently endowed with ample spectral resources. The Commission employs construction/coverage requirements to prevent licensees from hoarding spectrum.^{14/} Resources, however, are hoarded when they are scarce, while nationwide spectrum for narrowband wireless communications is abundant. The Commission has authorized twenty-six nationwide paging licensees, eleven narrowband PCS nationwide licensees, and six regional narrowband PCS licensees.^{15/}

Moreover, if paging spectrum were scarce, its value would be increasing. As the Commission is aware, the evidence is exactly the opposite— for the past year, the public market value of carriers with the largest endowments of spectrum has plummeted, and the value of wireless spectrum determined by competitive bidding has also declined precipitously. In this light, the proposal to re-impose coverage requirements on nationwide paging carriers is a solution in search of a problem.

^{13/}(...continued)
MHz nationwide paging.

^{14/}*See, e.g., PCS FNPRM*, at ¶46 (“build-out requirements may also prevent stockpiling or warehousing of spectrum”).

^{15/}In addition, these licensees face competition from wide area paging and PCS systems, and from other commercial mobile radio service (“CMRS”) licensees electing to provide comparable wireless communications on a regional or nationwide basis. The Commission has removed virtually all restrictions on mobile or fixed service offerings by CMRS providers. *See Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, First Report and Order and Further Notice of Proposed Rule Making, WT Docket No. 96-6, 11 FCC Rcd 8965, 8968 (1996).

III. NATIONWIDE LICENSEES SHOULD BE ALLOWED TO PARTITION

The most effective way to promote introduction of service to rural areas on the nationwide channels, and to stimulate entry of small businesses into the paging industry, is to extend partitioning to the nationwide channels under the same terms and conditions as MTA/EA licensees, as the Commission has proposed. This proposal was universally supported in the comments and should be immediately adopted. Allowing nationwide licensees to partition will allow further development of service on nationwide channels in geographic areas that may represent higher priority for the partitionee than for the nationwide licensee.^{16/}

IV. PARTITIONING RULES SHOULD GUARD AGAINST ABUSES OF THE LICENSING PROCESS WITHOUT RESTRICTING THE FLEXIBILITY OF LEGITIMATE CARRIERS

Like ProNet, most commenters support the Commission's proposals to deter any speculation and warehousing that might occur through abuse of partitioning.^{17/} Specifically, the comments expressed universal support for the Commission's proposals to: (1) apply the same coverage requirements to partitionees within their partitioned areas as imposed on geographic licensees;^{18/} and (2) subject small business partitioners to unjust enrichment provisions when selling partitions to a non-small business, including acceleration of installment payments.

^{16/}In addition, as discussed in ProNet's Comments (at 6), the affiliated local carrier provision of Section 22.551 of the Rules encourages expansion of 931 MHz nationwide service to remote and underserved areas.

^{17/}See, e.g., Comments of Airtouch, at 3-6; Comments of Metrocall, at 20-23; Comments of PageMart, at 4.

^{18/}ProNet supports Metrocall's proposal (Comments of Metrocall, at 22) that the Commission look favorably on requests for extension of time to construct where the partitionee has insufficient time to construct due to regulatory delay.

Commenting parties opposed the Commission's proposal to extend its ill-advised "substantial service" coverage alternative to partitionees.^{19/} Even as clarified by the Commission in its 2nd R&O and FNPRM, "substantial service" is woefully vague, inviting speculation and litigation over compliance with coverage requirements. Nevertheless, the Commission continues to advocate this concept on the grounds of licensee flexibility. This insistence on such an ambiguous exception to otherwise objective coverage requirements belies the Commission's expressed concern with application fraud and manipulation of the licensing process. If the Commission is intent on retaining the "substantial service" alternative, it must precisely define what construction/coverage will suffice.^{20/}

While the above proposals should greatly curtail abuse of the auction process, other proposals made by certain commentators are inordinately restrictive, unnecessary and should not be adopted. These proposals, and ProNet's alternatives, are discussed below.

A. Partitioner Responsibility for Coverage of Partitioned Territory

Metrocall (at 22) suggests that geographic licensees' coverage requirements should be based on the entire MTA or EA, even after partitioning, to prevent use of partitioning to evade coverage requirements. Similarly, PCIA (at 7) argues that the Commission should hold the partitioner responsible, and revoke its geographic license if the partitionee fails to meet its construction

^{19/}Comments of ProNet, at 9; Comments of Airtouch, at 5-6; Comments of Blooston, at 3.

^{20/}In its Comments (at 9, n.15), ProNet suggested coverage of fifty percent (at three years) and seventy-five percent (at five years) of the geographic area not covered by incumbent co-channel licensees in the subject MTA, EA or, in this case, partitioned area. Alternatively, the Commission could require licensees attempting to prove "substantial service" to satisfy specified levels of infrastructure investment by the three and five year deadlines.

obligations. ProNet believes these proposals, while legitimately concerned with fraudulent activity, are extreme.

To guard against misuse of partitioning, ProNet suggested that the Commission require non-incumbent geographic licensees to provide a threshold level of service— at least ten percent of the geographic area, and perhaps as much as one third of the MTA/EA population— before being allowed to “flip” a portion of the license through partitioning.^{21/} By requiring a partitioner to demonstrate its commitment to public service (through a substantial investment), ProNet’s alternative will adequately protect against misuse of partitioning, without interfering with partitioning agreements between legitimate carriers and sincere partitionees.^{22/}

B. Mandatory Partitioning for BETRS

Nucla-Naturita Telephone Company (“Nucla-Naturita”) proposes that rural telephone companies should have the right to require geographic licensees to partition portions of their markets for the provision of BETRS at no cost to the rural telephone company.^{23/} While ProNet is sympathetic to the concerns of BETRS providers, the Commission has already conveyed substantial concessions to BETRS in this proceeding— grandfathering all existing BETRS operations and

^{21/}See ProNet’s Petition for Reconsideration of Second Report and Order, at 25.

^{22/}PageNet recommends a similar condition in its Comments (at 12), requiring geographic licensees to meet the second coverage benchmark set forth in new Section 22.501(k)(2) of the Rules, *i.e.*, two thirds of the market population, before partitioning. ProNet believes that a lesser coverage requirement will suffice to deter misuse of partitioning, and that a two-thirds coverage requirement may prevent partitioning where beneficial to the public, *e.g.*, where an MTA is roughly divided between two incumbents, one of whom obtains the geographic license.

^{23/}Comments of Nucla-Naturita, at 3-6. The same argument is presented by Century Telephone Enterprises, Inc. in its Petition for Reconsideration of the 2nd R&O.

allowing BETRS providers to participate in auctions, obtain geographic partitions and obtain site-specific licenses on a secondary basis.^{24/} Nothing in the record suggests that rural telephone companies will be precluded from providing BETRS absent a mandatory no-cost partition upon demand. Accordingly, the Commission should reject Nucla-Naturita's proposal for mandatory, free BETRS partitioning.

V. SEVERAL SOUND PROPOSALS HAVE BEEN MADE REGARDING SHARED CHANNEL LICENSING

Several commenting parties have provided useful suggestions regarding deterring licensing fraud on the Part 90 shared channels. For example, multiple filers stress the need for official, publicly-available and publicly-distributed information regarding Commission licensing rules, procedures and application mill fraud.^{25/} Likewise, ProNet supports Metrocall's suggestion that a standardized "defect letter" be used to request additional information from suspicious applicants, and that new applicants include a demonstration of need/public interest statement with their applications.^{26/} ProNet also applauds PCIA's new policy of forwarding coordination notifications and other documentation directly to applicants (rather than merely to contact representatives) and providing co-channel printouts for new applicants. These procedures should be adopted by all

^{24/} 2nd R&O, at ¶¶34-35. The Commission made these concessions notwithstanding its findings that demand for BETRS has substantially declined, and that wireless carriers may provide rural local loop service as an inexpensive alternative to BETRS. 2nd R&O, at ¶33.

^{25/} See, e.g., Comments of Airtouch, at 8-9; Comments of PCIA, at 11-12. ProNet also supports PCIA's suggestion (Comments of PCIA, at 12) that the FCC make informative Public Notices available to coordinators for provision to shared frequency applicants.

^{26/} This latter requirement should apply only to new applicants for shared channel licenses; incumbents proposing to add sites to an existing system should be exempt.

frequency coordinators accepting applications for shared channels. Similarly, Airtouch's suggestion that frequency coordinators and the Commission limit the number of applicants licensed in a given area^{27/} bears further consideration; minimally, coordinators should, upon provision of co-channel printouts, apprise applicants of the operational constraints imposed on newcomers in highly-congested, shared-frequency environments.

Ultimately, however, as ProNet stated in its Comments (at 9), licensing fraud is best deterred through adherence to existing rules and prompt, decisive enforcement action whenever fraud is suspected. ProNet urges all frequency coordinators to report any suspicious applications or patterns of applications to the Commission, and encourages the Commission (in cooperation with the Federal Trade Commission) to promptly investigate any such cases.

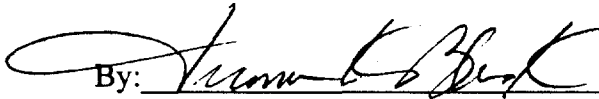
^{27/}Comments of Airtouch, at 9.

VI. CONCLUSION

WHEREFORE, the Commission should modify its proposed rules as set forth herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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